Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at http://about.jstor.org/participate-jstor/individuals/early-journal-content.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

BANKRUPTCY LAWS, PAST AND PRESENT.

BY WILLIAM H. HOTCHKISS.

THE passage of the bankruptcy law, approved July 1, 1898, by a vote of 43 to 13 in the Senate, and 134 to 53 in the House, will prove a way-mark in our history. The result of agitation which has been continuous since its discredited and unpopular predecessor was so emphatically repealed twenty years ago, it is necessarily a compromise; and the growth of a period of commercial depression, it gives statutory recognition to sentiments and passions just now deep-rooted and powerful. The war of the "involuntaries" against the "voluntaries" held the boards for a goodly season in Congress last winter. The voluntaries have rather the best of it. But the law as a whole must be accepted as a reasonable expression of the present sentiments of the entire people. It surely is a proclamation, as vigorous as it is emphatic, that in this day and generation it is not only the debtor that dies who is relieved of all debts, but that the unfortunate and the unwise may win surcease of their business sorrows and begin again on this side of the grave. It calls to mind that humanitarian provision of the Mosaic law which commanded a release of debtors every seventh year.

For more than twenty-five centuries, the law-makers of the world have been legislating on bankruptcy. Draco, the pioneer, made it, with laziness and murder, punishable by death. Quite naturally, there followed an age of the absconding debtor. Solon, not wishing to depopulate Athens, mollified these ancient blue laws, and even abolished enslavement for debt; but the bankrupt and the bankrupt's heirs forfeited their rights of citizenship. The noble Roman and his Twelve Tables were more draconic than Draco. Gibbon tells us that:

"At the expiration of sixty days the debt was discharged by the loss of

liberty or life; the insolvent debtor was either put to death, or sold in foreign slavery beyond the Tiber; but if several creditors were alike obstinate and unrelenting, they might legally dismember his body, and satiate their revenge by this horrid partition."

In the time of Cæsar, Roman jurisprudence and civilization had so developed that the debtor, by the famous *cessio bonorum,* might at least escape slavery, and in most cases retain his civil rights; and about a century later, our modern idea of a discharge to the honest debtor who gives up his all, was graven on their laws.

Shylock's savage rights may well speak for the laws of the Middle Ages, whose statutes were little better than a transparent palimpsest of the Twelve Tables of Rome. French laws have followed the Latin model, and, while somewhat modernized, even yet visit a degree of disgrace upon the unfortunate trader which would not long be tolerated by an Anglo-Saxon legislature.

Since 1542, about forty bankruptcy laws, and a number of insolvent debtor acts, have been passed in England. In this country, the statute of 1898 is the fourth of a series of national laws, the others being named from the years 1800, 1841 and 1867; while, in many of the States, and from their very beginning, insolvency statutes of local application and vastly divergent provisions have been on the books.

In view of the present interest in the subject, the following chronology may be valuable. We take the English statutes first:

(1.) The statute of 1542 was aimed at absconding or concealed debtors only. It made them criminals, deprived them of their property without giving them a discharge, and left them to the tender mercies of their creditors. It was followed by a number of similar laws, enlarging its scope and changing its procedure.

(2.) The statute of 1706, in the fifth year of Queen Anne, marks the next great step in advance. Debt was no longer treated as a crime, and provision was for the first time made for a discharge.

(3.) The statute of 1825, in the reign of George IV., for the first time recognized voluntary bankruptcies.

(4.) The statute of 1830 abolished commissioners in bankruptcy, put the administration of estates into the hands of the court, and created the official assignee or receiver.

(5.) The statute of 1861 made it possible for the non-trader,

who had been protected by the insolvent debtor acts for about fifty years, to take advantage of or to be proceeded against under the general bankruptcy laws.

(6.) The statute of 1869 introduced in England the now well-understood principle of fraudulent preferences; but, the law being easily evaded, it proved a failure.

(7.) The statute of 1883, as amended by that of 1890, carries the pendulum backward again, and, while for the first time distinguishing between a fraudulent bankruptcy and one due solely to misfortune, is drastic in its penalties and intolerable, at least from an American standpoint, in its limitations on the granting of a discharge.

Turning to the United States, we find that:

(1.) The statute of 1800 was copied from the English law of that time, and did not provide either for voluntary bankruptcy or for non-traders coming within its terms. It was repealed in December, 1803.

(2.) The statute of 1841, said to have been largely the work of Daniel Webster, introduced the idea of voluntary bankruptcy into our national jurisprudence. It was in force but eighteen months, being repealed by the Congress that passed it.

(3.) The statute of 1867 was framed largely on the Massachusetts insolvency law of 1838. It provided for both voluntary and involuntary bankruptcy, and went almost to the extreme in its enumeration of acts of bankruptcy and in its restrictions on the granting of discharges. This law permitted tedious delays and excessive fees. It remained in force until September, 1878.

(4.) The statute of 1898 swings back toward mercy again. It will be remembered as the first of our statutes to omit that anciently all-important act of bankruptcy, "the suddenly fleeing to parts unknown," and as establishing a new meaning for "insolvency."

The animated and often acrimonious discussion of bankruptcy legislation has turned on a half-dozen disputed principles and matters of detail. Nowhere, save in the United States, where local insolvency laws have temporarily filled the gap, has the necessity of such legislation been denied. All civilized and many semi-civilized countries enforce such laws. France has not been without a bankruptcy law for four hundred years, nor England for a period nearly as long. It is settled, too, that such laws

should have three purposes—(1.) the surrender of the debtor's estate without preferences; (2.) its cheap and expeditious distribution *pro rata* among all creditors, and (3.) the discharge of the debtor from liability to pay provable debts with property which he may afterwards acquire.

Each statute has sought the common goal by different ways, but always by or near definite landmarks. It will assist to a better understanding of the law of 1898, if we note these landmarks. (1.) Who may become a bankrupt? (2.) What are acts of bankruptcy? (3.) What is a preference? (4.) When may a discharge be refused? (5.) What is the procedure which will prove least expensive and most expeditious? This classification includes two elements born since Blackstone's time.

Who May Become a Bankrupt?—The limitation to traders has already been mentioned. Indeed, so late as 1817 in this country, Judge Livingston doubted whether an act of Congress subjecting to such a law every description of persons within the United States, would be constitutional. Yet our law of 1841 extended the meaning of the term "trader" so that, in involuntary bankruptcies, it included bankers, brokers, factors, underwriters and marine insurers. All classes of persons could become bankrupts in England after 1861; and the like broad rule received expression in our law of 1867, with the single exception that, when the act of bankruptcy consisted in failure to pay commercial paper, it applied only to merchants, bankers and the business community. The new law of 1898, however, barometrically responsive to the present stormy financial times, goes backward to the time of George II., and prohibits, as did one of the laws passed in his reign, involuntary proceedings against farmers and wage earners.

Its provisions relative to corporations are equally indicative of prevailing conditions. For some decades English corporations have been liable to proceedings in bankruptcy. Our law of 1841 was limited to natural persons. That of 1867 was made expressly applicable to all moneyed, business and commercial corporations. Yet the law-makers of 1898, fearful lest, by collusion with stockholders, the controlling officers might force such semi-public corporations as railroads and transportation companies into bankruptcy, have limited the operation of the law to corporations engaged principally in manufacturing, trading, printing, publish-

ing, or mercantile pursuits. Pending political passions have swung us backward in these two particulars. These provisions, however, can prove of little or no practical importance, and to the future historian, they will seem as curious as do to us those ancient acts of bankruptcy, "keeping his house" and the "fleeing to the Abbey."

What Are Acts of Bankruptcy?—In the United States this has been the kernel of the controversy. Our laws have answered the question in widely different ways. Not so in England. That original act of bankruptcy, absconding the realm, is in every English statute for three hundred and fifty years, and appears in the last law in almost the very words used in the first. Our laws, down to and including that of 1867, have been equally mindful of the commercial runaway. The new law, however, omits this cause entirely. The welcher in business can be punished in other ways; our chief concern is, indeed should be, with the stay-at-home cheat.

The English catalogue of interdicted acts in business has grown long. Two hundred years ago involuntary bankruptcy was worse even than imprisonment for debt, for it involved that; and, prior to the evolution of the idea of a discharge, it practically was civil death. The condition of the English law of that time may be imagined from this decision of a court of the period:

"If a man is taken in execution and lies in prison for debt, neither the plaintiff at whose suit he is arrested, nor the sheriff who took him, is bound to find him meat, drink or clothes; but he must live on his own or on the charity of others, and if no one will relieve him, let him die in the name of God, says the law; and so say I."

Freedom from imprisonment for debt has, of course, changed this, but in the latest English statutes there are relics of this old-time savagery toward debtors, happily not included in our laws.

The present bankruptcy law of England gives eight acts of bankruptcy, three predicated on fraud coupled with insolvency, three of a voluntary character showing insolvency, and two others which are relics of the old rules against fleeing the realm or concealing property. A debtor who does not lift a levy on his goods within twenty-one days, or who does not within seven days after judgment comply with a creditor's demand that he pay, compound or secure the debt, commits an act of bankruptcy. The older laws put default in payment of demand ob-

ligations in the same category, thus extending a rule rightfully enforced against banks and bankers to the entire business community.

Our law of 1841 defined but five acts of bankruptcy, all predicated on fraud. The law of 1867 went much further and, in addition to the customary grounds, specified as one of its ten acts of bankruptcy, fraudulent default in payment of commercial paper by merchants, traders and manufacturers. The law just passed, however, goes back to the side of leniency again. It enumerates five acts of bankruptcy, two of them involving fraud on the part of the bankrupt (fraudulent conveyances and voluntary preferences), one constructive fraud, and two which are expressed by the paradox that by them a debtor may go into involuntary bankruptcy voluntarily. The Torrey bill enumerated nine acts of bankruptcy, going further even than the English law and including default for thirty days in the payment of commercial paper, a rule which would have upset our entire credit system. The Nelson bill went to the other extreme and made fraudulent transfers and voluntary preferences while insolvent, the only acts of bankruptcy. The law as passed is perhaps, a fair compromise, though in extreme cases we may wish for the more complete and far-reaching definition of the English statute.

But, whatever the effect, lawyers and laymen alike will quickly understand that insolvency has a new meaning. The English statute defines it as inability on the debtor's part to pay from his own moneys his debts as they become due. The American law declares that he only is insolvent the aggregate of whose property shall not, at a fair valuation, be sufficient in amount to pay his debts. In short, in this country, hereafter, he who has unconvertible property in plenty but little cash on hand—as for example, he who in this time of unsalable real estate is land poor—may yet be solvent and entitled to the time to realize and pay his creditors.

At first blush this seems broadly equitable, but what will be the result in actual practice? Perhaps, had it been in force, the author of "Waverley," with his vast genius as his property, would not have been insolvent, and that other Scotchman, Anderson by name, who possessed, yet would not surrender, the secret formula for a popular nostrum, might have proved it overworth his debts,

and escaped the penalties of the law. On the other hand, into what dangerous controversies will it lead us! Hitherto the proof of insolvency has been simple and easy. Now it never can be. The expert on values has a new field open to him, as creditors and debtors, not to speak of lawyers and courts, may quickly learn.

In practice, the law will, therefore, prove little more than a voluntary law. Its sponsors claim that it will accomplish all that it was intended to do by the mere threat of possible procedure. The debtor will never know when his creditor will open fire. Therein is its chief merit to the business world. Experience will prove whether it is a boon or a bane. But our hysterical Congressmen should be able now to sleep o' nights; for under this law there can be by the rich no "grinding the face of the poor."

What Is a Preference?—This is a comparatively recent development of the law of bankruptcy. The earliest regulation is that of 1690, in Scotland, which annulled preferences made within two months of bankruptcy. The common law permitted preferences, and debts in favor of wives and female relatives in general were a refuge frequently found by the failing debtor. It is not likely that the chattel mortgage method of preference was then understood; that is the product of our higher civilization. But, for centuries, scandals without number and frauds on creditors by the multitude have flowed from the too gentle policy of the law in this regard. Our State insolvency laws, most of them sanctioning limited preferences, have proved but invitations to defraud. The preferring debtor has become one of the evils of our civilization, as was the absconding debtor of that of two centuries ago.

Beginning in 1849, in England, and in 1841, in the United States, preferences have been interdicted by law. The English statute made them void if intended to defeat or delay creditors. The present law of England provides that, to constitute a preference, it must be made within three months of the commencement of proceedings in bankruptcy; while, if made when the debtor is insolvent and with a view of giving the creditor a preference over other creditors, it declares them absolutely void.

Our statutes, again, evidence the swinging of the pendulum. That of 1800 did not inhibit such transactions; that of 1841 made the giving of preferences ground for refusing a discharge.

The law of 1867, copying the Massachusetts insolvency act of 1838, compelled creditors to prove, in addition to the facts required by the present English law, knowledge on the part of the person preferred that the act was in fraud of the bankruptcy law; in short, it practically required proof of collusion by the creditor. Under the new law, a preference seems to be one thing if asserted in a voluntary proceeding, and another if alleged as an act of bankruptcy on which an involuntary proceeding is to stand. In both cases, the preference must have been made within four months of the filing of the bankrupt's petition. But, in the former, the proof need not go further, in any but exceptional cases, than to show that the act will result in giving one creditor more than others, and that such creditor had reasonable cause to believe that by the act the debtor intended to prefer him; while, in the latter, not only insolvency —which, as we have seen, is difficult of proof—but intent to prefer, must be shown.

Therein lies the weakness of the new law, as a permanent relief to creditors. Family reunions at creditors' meetings in courts of bankruptcy are still both possible and probable. The cheat and the cozener, unless checked by the vigilance of judges and referees, may become as notorious as they were in other days, and a convenient relative or willing friend may still continue to be the ready safe deposit for the plunder of the mercantile rogue.

When May a Discharge Be Refused?—In nothing else does the English bankruptcy system differ from our own as much as in this. No discharge was granted a debtor until the reign of Anne. A little later, not only a discharge, but allowances on dividends, varying from three to ten per cent., were granted to the bankrupt, in order that he might get a fresh start; a provision which also appears in our bankruptcy law of 1800. Until a comparatively recent period, the discharge was of no value unless signed by a specified number of creditors, which rule seems still to prevail in France. Since 1832, discharges in England have been in the discretion of the court, subject to some rather drastic limitations of a punitive character. This discretion has been abused; and yet the present English law permits discharges to be refused for numerous reasons, such as the debtor's continuance in business after knowing himself to be insolvent, failure

to pay dividends of at least fifty per cent., rash and hazardous speculations, unjustifiable extravagance in living, culpable neglect of business affairs, and failure to account satisfactorily for losses.

Englishmen, too, have been prone to classify discharges. By the law of 1849, there were three kinds with corresponding effects; those given when the bankruptcy was wholly unavoidable, those when it was partly unavoidable, and those belonging to neither of the latter classes. The present English law permits the court to refuse a discharge outright, to withhold it for not less than two years, to withhold it until the estate shall pay fifty per cent., or to require the bankrupt to allow judgment against himself for the difference between the required fifty per cent. and the amount of dividends actually paid. It seems curious that this latter is the usual method, and yet that the present law of England is far and away the most successful and the fairest bankruptcy law yet enforced in that country.

While the list of objections to discharges in England is on the increase, here it is growing smaller and smaller. In 1800, among other restrictions, the bankrupt was not entitled to a discharge unless he paid seventy-five cents on the dollar. In 1841, a majority of creditors in number and value might prevent the discharge by filing a written dissent thereto. The law of 1867, as amended in 1874, refused a discharge to voluntary bankrupts who did not pay thirty per cent. on claims proved, except with the assent of one-fourth of their creditors in number and one-third in value; and, copying the English model, it enumerated ten acts, the commission of which might deprive him of his discharge.

The new law goes to the antipodes of the present English statute, and not only wipes out the necessity of paying any percentage in dividends, a very proper change, but abolishes the semi-control of creditors over discharges, and allows a certificate to be withheld only when the debtor has committed one of the felonies enumerated in the law, or when he has *fraudulently* failed to keep, or in contemplation of bankruptcy has destroyed or concealed, his books of account. Not even a fraudulent preference is objection to a discharge. "Life tenure" and "government by injunction" have thus their legitimate offspring in this sugar-coated section of our law. The Delilah of Populism has shorn the Federal judiciary of its power. The buzzards, to

use Senator Stewart's picturesque designation for creditors, have been deprived of their prey. What matter, then, if the commercial rascal and the business pickpocket be free again!

What Is the Least Expensive and Most Expeditious Procedure?—Probably nine-tenths of the criticism of bankruptcy legislation has been directed to details of procedure. In England, for more than half a century, the lines were drawn for or against officialism. Prior to 1831, bankrupt estates were administered by three commissioners, largely controlled by the creditors. From that time down to 1869, the courts administered through their assignees. Then for a decade or more, creditors took hold again and made a mess of it. The present law is a compromise, an official of the Board of Trade being in charge until the creditors get together and determine on action. It seems to have made little difference which system prevailed, as, so it is said, in the one the lawyers preyed on the estates and in the other the courts and their appointees did so.

The English procedure has always been complicated. It has provided elaborately for compositions and arrangements, with the result that, until the present law, debtors have more often compounded and compromised than gone through the courts and obtained their discharge. From 1870 to 1877, there were but 8,275 bankruptcies, these nearly all involuntary, to 31,651 liquidations and 20,270 compositions. Even under the present English law, the actual official bankruptcies are in number hardly more than the so-called deeds of arrangement. On the other hand, the rigid public examination which is now required, operates both as a threat to the fraudulent bankrupt and as a protection and vindication to the honest or unfortunate debtor. It stimulates the co-operation of negligent creditors and prevents much fraud.

In the United States the administration of bankruptcy laws has too often been odorous from nepotism and onerous with costs. In the lurid rhetoric of the Congressional debates, it was "the rodents who burrow around the places of justice," and "pillage by the fee-fiend" which discredited the law of 1867 and led to its repeal. The present law is intended to avoid these criticisms. Rapidity in administration is commanded in words and compelled in practice, by making the payment of fees contemporaneous with the winding up of the estate. The fees themselves are small, so small indeed as, in the minds of some, to

jeopardize the proper administration of the law; while but one reasonable bill of costs can be allowed the bankrupt's lawyers, no matter how many are employed, and any payments made to them by way of advances for legal services are subject to scrutiny. Bankruptcy courts, presided over by referees having broad judicial powers, are established in every county. Indeed, bankrupts and creditors could not well have a procedure which is simpler, less expensive or more favorable to themselves.

Such is the latest product of bankruptcy legislation, genealogically examined. Starting with the Torrey bill, notable for its too harsh provisions, proceeding through the Nelson bill, as inadequate in procedure as it was lacking in a broad grasp of the dangers to commercial morality, which had to be avoided, and finally developing into a compromise between the latter and the Henderson substitute, a measure which seemed to find the golden mean, it goes on the books as a law for temporary relief, not for permanent control. Many assert that this is as it should be. The crying need for its passage was that the unfortunates, who have been in bondage to debts and judgments born of the late period of depression might be free again; and the country will quickly feel the effects of the restored energy of the tens of thousands who have gone down in recent wrecks. So far the law is expressive not only of our humanity, but of our commercial common sense. The honest bankrupt is needed back in the ranks of business. There are, however, others, who "will pay you some, and as most debtors do, promise you infinitely." And there are yet others, who, in spirit, if not in deed, would in these times of prejudice and passion listen willingly to ancient Timon's exhortation to his brother debtors within the walls of Athens:

> **"Bankrupts, hold fast;**
> **Rather than render back, out with your knives,**
> **And cut your trusters' throats."**

We might have gone further and enacted a law which would prove valuable in times of prosperity, as well as in times of depression. Just now the law-giver can well be a philanthropist. Year in and year out, he must be a policeman, too. Our law of 1898 is philanthropic to a degree, but as a discourager of commercial dishonesty, it is like a peace officer without a warrant, or a policeman with unloaded revolver. The majesty and the threat of the law are there, but, unless its officer is keen

eyed and a good runner, the fraudulent bankrupt will usually escape. It may be that in practice creditors will boldly risk defeat and damages to force the mercantile fraud into the hands of the court; but it is not likely. At any rate, the bankrupt need no longer fear the diligent creditor, but rather the daring one.

There is, of course, in many quarters another view of the law and its purpose. It is thought typical of man's increasing humanity to man. The bankrupt will always be with us; so will the creditor. The former needs protection against the latter; the creditor can take care of himself. Thus many a good citizen may find comfort in the reflection that, if we have gone far toward preventing involuntary bankruptcy, it has been that our laws might be just rather than severe, and expressive of the principle that a score of rascals had better go unpunished rather than that one honest man should suffer oppression. This is the spirit of the age.

Nearly a century and a half ago Blackstone declared that the bankruptcy laws of his time were "founded on princples of humanity as well as justice." Modern jurists would not now assure us that such was the case; else to what purpose did John Howard live, or how came it that Dickens moved a sympathetic world with his story of Little Dorrit and the debt-deadened prisoners of Marshalsea. Now, even the day seems passing when, in the words of the gentle Autocrat,

> **"The ghostly dun shall worry his sleep,**
> **And constables cluster around him;**
> **And he shall creep from the wood-hole deep**
> **When their spectre eyes have found him."**

Old things are passing away. Sympathy sits where sternness sat. The nimble debtor is no longer part of a tragedy. He belongs to the serio-comic drama instead. Bankruptcy is not a crime, but a condition; not always a disgrace, but rather a disease; and present laws, while providing relief for him who owes, seem but negatively valuable to him who owns.

WILLIAM H. HOTCHKISS.